



Muka & another v Malala & 12 others; Commission for University Education & 2 others (Interested Party) (Constitutional Petition E002 & E001 of 2022 (Consolidated)) [2022] KEHC 10131 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10131 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E002 & E001 OF 2022 (CONSOLIDATED)
PJO OTIENO, J
JUNE 23, 2022
(FORMELY NAIROBI CONSTITUTIONAL PETITION NO. E264 OF 2022)
IN THE MATTER OF ARTICLES 2(1), 2(4), 3(1), 10(1) & (2), 22(2)(B),
23,35,38,81(E), 88(4)(F) AND 165 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF CHAPTER 6 OF THE CONSTITUTION
OF KENYA, 2010 ON LEADERSHIP AND INTEGRITY
AND
IN THE MATTER OF SECTIONS 19,22,23&29 OF
THE PUBLIC OFFICERS ETHICS ACT NO. 4 OF 2003
AND
IN THE MATTER OF 22(2) OF THE ELECTIONS ACT, 2012 NO. 24 OF 2011
AND
IN THE MATTER OF THE GUBERTNATORIAL ELECTIONS FOR KAKAMEGA COUNTY
BETWEEN
FRED MUKA.....PETITIONER
VERSUS
HON. CLEOPHAS WAKHUNGU
MALALA.....1ST RESPONDENT
THE VICE CHANCELLOR UNITED STATES



INTERNATIONAL UNIVERSITY.....2ND RESPONDENT
UNITED STATES INTERNATIONAL UNIVERSITY.....3RD RESPONDENT
THE COMMISSION FOR UNIVERSITY EDUCATION.....4TH RESPONDENT
THE KENYA NATIONAL EXAMINATIONS COUNCIL.....5TH RESPONDENT

THE INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION.....6TH RESPONDENT
THE RETURNING OFFICER, KAKAMEGA COUNTY.....7TH RESPONDENT
ETHICS AND ANTI CORRUPTION COMMISSION.....8TH RESPONDENT
THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....9TH RESPONDENT

(AS CONSOLIDATED WITH CONSTITUTIONAL PETITION NO. E001 OF 2022)

IN THE MATTER OF DISQUALIFICATION FROM HOLDING STATE
OFFICE UNDER ARTICLE 75 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF BREACH OF CONSTITUTIONAL RIGHTS
UNDER ARTICLE 38 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE JURISDICTION OF THE HIGH COURT OF KENYA
UNDER ARTICLE 165(3)(D)(II) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

FRANKLINE SHILINGI ANGUCHE PETITIONER

AND

MALALA CLEOPHAS WAKHUNGU 1ST RESPONDENT

UNITED STATES INTERNATIONAL UNIVERSITY 2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT

JOSEPH AYATTA-COUNTY RETURNING OFFICER KAKAMEGA 4TH
RESPONDENT

AND

COMMISSION FOR UNIVERSITY EDUCATION INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

DIRECTOR OF CRIMINAL INVESTIGATIONS INTERESTED PARTY



The doctrine of exhaustion can be applied where the authenticity of academic certificates of political aspirants are challenged in court in light of IEBC's Dispute Resolution Committee's determination that it doesn't have the jurisdiction to ascertain the authenticity of academic certificates

The 3rd and 4th respondents filed a preliminary objection on grounds that the petition and application be dismissed for want of jurisdiction as they, and by extension the court were usurping the 3rd and 4th respondents' jurisdiction and mandate to nominate, validate or invalidate the 1st respondent's nomination to vie for the position of Governor Kakamega County. The court noted that the consequence of an election not being conducted in accordance with the Constitution were dire and the ignominy was the overthrow of the rule of law as the ultimate price. The court pointed out that a court could not deny a litigant audience and leave such litigant without a recourse. The court thus held that the instant case was an apt case for application of the exceptions to the doctrine of exhaustion.

Reported by Kakai Toili

Constitutional Law - institution of constitutional petitions - doctrine of exhaustion - applicability of the doctrine of exhaustion - whether the doctrine of exhaustion could be applied where the authenticity of academic certificates of political aspirants were challenged in court in light of the Independent Electoral and Boundaries Commission's Dispute Resolution Committee's determination that it did not have jurisdiction to ascertain the authenticity of academic certificates - Constitution of Kenya, 2010, article 88(4).

Jurisdiction - jurisdiction of the High Court - jurisdiction to determine disputes concerning the legality, authenticity and genuineness of academic certificates - whether the High Court could determine disputes concerning the legality, authenticity and genuineness of academic certificates presented by an election aspirant - Constitution of Kenya, 2010, article 88(4).

Electoral Law - elections - conduct of elections - what was the consequence of an election not being conducted in accordance with the Constitution.

Brief facts

The 3rd and 4th respondents filed the instant preliminary objection on the grounds; that the petition and the application be dismissed for want of jurisdiction as the petition and the application and by extension the court were usurping the 3rd and 4th respondents' jurisdiction and mandate to nominate, validate or invalidate the 1st respondent's nomination; that the petition and the application be dismissed as they sought the court to intervene and direct the 3rd and 4th respondents on how to carry out their mandate; and that the petition and the application be dismissed for want of jurisdiction.

The 1st respondent submitted that article 88(4) of the Constitution of Kenya, 2010 (Constitution) mandated the 6th and 7th respondents (the Independent Electoral and Boundaries Commission and the Returning Officer Kakamega County respectively) to determine pre-election disputes. The 1st respondent argued that the jurisdiction of the court in pre-election disputes was supervisory. He further submitted that where the law had established a dispute resolution mechanism, no other body could usurp such powers. The 6th and 7th respondents contended that the court could not clothe itself with original jurisdiction in matters it did not have original jurisdiction.

The petitioners argued that the petition touched on the genuineness of academic documents presented by the 1st respondent to the 6th respondent and that the 6th respondent did not have the mandate to determine the validity and genuineness of a document presented by an aspirant or candidate. The petitioners further argued that the 6th respondent had no investigative machinery to undertake enquiries into the validity and legitimacy of academic certificates and credentials supplied by candidates and in support of that position.



Issues

- i. Whether the doctrine of exhaustion could be applied where the authenticity of academic certificates of political aspirants was challenged in court in light of the Independent Electoral and Boundaries Commission's Dispute Resolution Committee determination that it did not have jurisdiction to ascertain the authenticity of academic certificates.
- ii. Whether the High Court could determine disputes concerning the legality, authenticity and genuineness of academic certificates presented by an election aspirant.
- iii. What was the consequence of an election not being conducted in accordance with the Constitution?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 88 - Independent Electoral and Boundaries Commission

(4) *The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—*

(e) *the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results*

Held

1. The Constitution had assigned different organs the jurisdiction to determine disputes of different categories and such organs and bodies had to be allowed to grow and execute mandates. Article 88(4) of the Constitution for example vested the power to handle pre-election disputes including nomination disputes to the Independent Electoral and Boundaries Commission (IEBC). To give effect to the constitutional provision, section 74(1) of the Elections Act reiterated the mandate almost verbatim.
2. The academic qualifications for a person vying for the seat of a governor was legislated in article 180(2) as read with article 193(1)(b) of the Constitution and broken down to the details by section 22(1)(b) (ii) of the Elections Act. The base line was that to be eligible to contest the office of the governor of a county, one had to be a holder of a degree from a university recognized in Kenya. Over and above the statutory set academic requirement the overriding moral and ethical standing for any public office remained firmly indispensable.
3. The rule of law had to be obeyed as a pillar of values and principles of governance. The consequence of an election not conducted in accordance with the Constitution were dire such as the conduct of fresh elections at the very least but the ignominy was the overthrow of the rule of law as the ultimate price.
4. The law had to be obeyed and before it locked a party from being heard by resorting to the very draconian remedy of striking out a matter, the court ought to conduct a full inquiry into the legitimacy of the academic certificates presented by the 1st respondent so as to ensure that elections were carried out in accordance with the Constitution.
5. While the instant matter was pending determination, the forum the respondents were asking the court to direct the petitioners to, the 6th respondent's Dispute Resolution Committee (the Committee), in Complaint No. 230 of 2022, *Denis Gakuo Wabome v Sakaja Koskei Nelson and another*, (unreported) delivered on June 19, 2022, had delivered itself and determined that it lacked the mandate and thus jurisdiction to investigate or otherwise ascertain the authenticity of academic certificates presented to it by a political aspirant beyond the provisions of regulation 47, Election (General) Regulations, 2012.
6. With that development in *Denis Gakuo Wabome v Sakaja Koskei Nelson and another*, and before it was challenged and reversed by the court, and noting that the instant complaint was on the same allegations as in the matter before the Committee, it would be an injustice by way of denial of a right to access justice to accede to the preliminary objection and render the petitioners without a forum. A court of law could not deny a litigant audience and leave such litigant without a recourse. The instant case



was an apt case for application of the exceptions to the doctrine of exhaustion in that a value of the Constitution regarding the rule of law would not be served if the court declined jurisdiction.

7. [**Obiter**] "I shudder to ask what would be the outcome of a clear case of an illegible candidate who get his way into victory and into the office of a governor then it merges that he had no qualifications at all! Would an election court turn its eyes and face the other way and acquiesce to the obvious violation of the law? Wouldn't the court ask itself whether it can acquiesce to an illegality or improper conduct?"

Preliminary objection dismissed.

Orders

Costs in the cause.

Citations

Cases

Kenya

1. *Ethics and Anti-Corruption Commission v Granton Graham Samboja & another; Kenyatta University & another (Interested Parties)* Petition 382 of 2017; [2021] KEHC 8610 (KLR) - (Mentioned)
2. *Kabage, Karanja v Joseph Kiuna Kariambegu Nganga & 2 others* Election Petition 12 of 2013; [2013] KEHC 1050 (KLR) - (Mentioned)
3. *Kilonzo, Diana Kethi & another v Independent Electoral and Boundaries Commission & 10 others* Petition 359 of 2013; [2013] eKLR - (Mentioned)
4. *Maelo, Eliud Wafula v Ministry of Agriculture & 3 others* Civil Appeal 174 of 2012; [2016] KECA 750 (KLR) - (Mentioned)
5. *Mahamud, Mohamed Abdi v Ahmed Abdullahi Mohamas & 3 others; Ahmed Ali Muktar (interested party)* Petition 7 of 2018; [2019] eKLR - (Explained)
6. *Moki, Kennedy v Rachel Kaki Nyamai & 2 others* Election Appeal 4 of 2018; [2018] KECA 553 (KLR) - (Explained)
7. *Muthinja, Geoffrey & another v Samuel Muguna Henry & 1756 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR) - (Explained)
8. *Parsimei, Francis Gitau & 2 others v National Alliance Party & 4 others* Constitutional Reference 356 & 359 of 2012; [2012] KEHC 2603 (KLR) (Consolidated) - (Mentioned)
9. *Republic v Independent Electoral and Boundaries Commission ex parte Charles Ondari Chebet* Judicial Review 3 of 2013; [2013] KEHC 5175 (KLR) - (Mentioned)
10. *Vuko, Samson Chembe v Nelson Kilumo & 2 others* Civil Appeal 65 of 2015; [2016] KECA 541 (KLR) - (Mentioned)
11. *Wahome, Denis Gakuo v Sakaja Koskei Nelson & another* Complaint No 230 of 2022 - (Mentioned)
12. *Waity, Sammy Ndung'u v Independent Electoral and Boundaries Commission & 3 others* Election Appeal 2 of 2018; [2018] KECA 420 (KLR) - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 88(4)(d)(e); 99; 137; 165(6); 180(2); 193(1)(b) - (Interpreted)
2. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulations 30, 33, 43, 46, 47 - (Interpreted)
3. Elections Act, 2011 (Act No 24 of 2011) sections 22(1)(b)(ii),(2); 31; 34; 74, (1); - (Interpreted)
4. Leadership and Integrity Act, 2012 (Act No 19 of 2012) In general - (Cited)
5. Political Parties Act, 2011 (Act No 11 of 2011) section 41 - (Interpreted)

Advocates

Ms. Olucheli for the petitioners

Mr. Malalah for the 1st respondent

Ms. Odek for the 3rd & 4th respondents



RULING

1. Before this court is the 3rd and 4th respondents preliminary objection dated June 7, 2022 premised on the following grounds: -
 - a) That the petition and the application be dismissed for want of jurisdiction as the petition and the application and by extension this court are in effect usurping the 3rd and 4th respondents' jurisdiction and mandate under regulation 30 and 43 of the *Elections (General) Regulations 2021* to nominate, validate or invalidate the 1st respondent's nomination.
 - b) That the petition and the application be dismissed as they seek this court to interfere and direct the 3rd and 4th respondents on how to carry out their mandate under *Constitution* and the *Elections Act*.
 - c) That the petition and the application be dismissed for want of jurisdiction by dint of article 88(4)(d) and (e) of *Constitution* 2010 as read with section 74 of the *Elections Act, 2011* that mandates and grants the IEBC with authority and jurisdiction to resolve disputes relating to or arising from nominations.”
2. The preliminary objection has been argued by way of written submissions.

1st Respondent's Submissions

3. It is the submission of the 1st respondent that article 88(4) of *Constitution* mandates the 6th and 7th respondent to determine pre-election disputes. He argues that the jurisdiction of this court in pre-election disputes is supervisory as espoused under article 165(6) of *Constitution* and referred the court to the case of *Diana Kethi Kilonzo & another v Independent Electoral and Boundaries Commission & 10 others* [2013] eKLR. He submits that where the law has established a dispute resolution mechanism, no other body can usurp such powers. They cited the case of *Republic v Independent Electoral and Boundaries Commission ex parte Charles Ondari Chebet, Francis Gitau Parsimei & 2 others v National Alliance Part & 4 others* and *Sammy Ndung'u Waity v Independent Electoral and Boundaries Commission & 3 others*.

6th and 7th Respondents' Submissions

4. It is also the submission of the 6th and 7th respondents that the jurisdiction of this court is ousted by dint of article 88(4)(d) and (e) of the *Constitution* as read with section 74 of the *Elections Act, 2011*. They relied on the case of *Eliud Wafula Maelo v Ministry of Agriculture & 3 other* [2016] eKLR to emphasize that the jurisdiction of the high court can be ousted by statute. They contend that this court cannot clothe itself with original jurisdiction in matters it does not have original jurisdiction. They referred the court to the case of *Samson Chembe Vuko v Nelson Kilumo & 2 other* [2016] eKLR in support of this position.

Petitioners' Submissions

5. It is the submission of the two petitioners that this petitions touches on the genuineness of academic documents presented by the 1st respondent to the 6th respondent and that the 6th respondent does not have the mandate to determine the validity and genuineness of a document presented by an aspirant or candidate. To support this position, he relied on the case of *Ethics and Anti-Corruption Commission*



v Granton Graham Samboja & Another; Kenyatta University & another (Interested parties) [2021] eKLR.

6. The petitioners further argue that the 6th respondent has no investigative machinery to undertake enquiries into the validity and legitimacy of academic certificates and credentials supplied by candidates and in support of this position they placed reliance on the case of *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamas & 3 other; Ahmed Ali Muktar (interested party)* [2019] eKLR. He further contends that where *Constitution* has provided for two or three methods of resolving disputes, none can exclude the other. He referred the court to the case of *Kennedy Moki v Rachel Kaki Nyamai & 2 others* [2018] eKLR.
7. In asserting that this court has the jurisdiction to hear this petition, the petitioner placed reliance on the case of *Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 others* [2013] eKLR where the court held that in determining the question of validity of an election, the court is bound to examine the entire election process leading up to the declaration of results.

Issues

8. This court has considered the application and submissions offered by the parties and identifies the only issue for determination to be whether this court has the jurisdiction to determine a pre-election dispute regarding the legitimacy of academic certificates offered by a gubernatorial candidate/aspirant.

Analysis

9. The *Constitution of Kenya, 2010* has assigned different organs the jurisdiction to determine disputes of different categories and such organs and bodies must be allowed to grow and execute mandates. Article 88(4) for example vests the power to handle pre-election disputes including nomination disputes and provides: -

“The commission is responsible for

- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;”

10. To give effect to the constitutional provision, section 74(1) of the *Elections Act* No 24 of 2011 reiterates the mandate almost verbatim and provides: -

“Pursuant to article 88(4)(e) of *Constitution*, the commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”

11. The reading of the subject petitions reveals that both question the authenticity of academic certificates presented by the 1st respondent to the 6th respondent in his contest for the gubernatorial seat, Kakamega County.
12. The academic qualifications for a person vying for the seat of a governor is legislated in article 180 (2) as read with article 193(1)(b) of the *Constitution* and broken down to the details by section 22(1)(b) (ii) of the *Elections Act*, No 24 of 2011. The base line is that to be eligible to contest the office of the governor of a county, one must be a holder of a degree from a university recognized in Kenya. Over



and above the statutory set academic requirement the overriding moral and ethical standing for any public office remain firmly indispensable¹.

13. Here however, the question that the court is called upon to determine is whether this court can hear and determine disputes concerning the legality, authenticity and genuineness of academic certificates presented by an election candidate bearing in mind that qualification of candidates running for the seat of a governor are underpinned in the Constitution.
14. In answering this question and in turn determining the preliminary objection, the court appreciates the industry by counsel in the research disclosed in the submissions filed.
15. The court has had the benefit or perusal of such submissions and the decisions cited and it narrows down that both sides agree that the law applicable is actually to be found in the binding decisions of the Supreme Court in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR and Sammy Ndung'u Waity v Independent Electoral and Boundaries Commission & 3 others (2019) eKLR
16. In Mohamed Abdi Mahamud's case (*supra*), where the election of the appellant, as the governor of Wajir county, was nullified by the high court, as an election court, on the ground that the appellant did not have the requisite academic qualifications to vie in the election. That decision was upheld by the Court of Appeal but upset by the Supreme Court on several grounds among them on the basis that the determination of whether or not a candidate is qualified to contest is a matter to be determined prior to the conduct of the elections as a pre election dispute with two judges of the dissenting on the basis that where such is not taken up at that stage then it remains a threshold issues going to the root of the election and may be taken up by the election court.
17. In his dissent demystifying the meaning and interpretation of article 88(4)(e) of the Constitution, Maraga CJ, JSC, as he then was held and rendered himself as follows;

“ [140] ...in this regard, I would like to debunk the appellant's notion that article 88(4)(e) has vested IEBC with exclusive jurisdiction to determine pre-election “electoral disputes relating to or arising from nominations”.

[141] In my view, a contextual interpretation of article 88(4)(e) divides into two categories the pre-election nomination disputes therein referred to. The first category comprises of the disputes which are founded under the general rubric of the constitutional qualification or eligibility criteria to contest in an election as set out in article 99 for Member of Parliament; article 137 for President; and article 193 for Member of the County Assembly.

[142] The second category includes intra-party nomination disputes contemplated by section 31 of the Elections Act such as whether or not one was properly selected under the “rules of the political party concerned relating to members of that party who wish to contest” in a given election which the PPDT may or may not have resolved under section 41 of the Political Parties Act; and disputes under section 34 of the Elections Act as to whether one's name should or should not be on a political party list. This category of disputes are not founded on any constitutional criteria and do not therefore go to the root of an election. In my view, IEBC has exclusive jurisdiction to determine this category of disputes. It should therefore determine them with finality subject to any

¹ Article 193(1)(b)



appeals in accordance with the procedure set out in the [Elections Act](#) and the election courts should not entertain them.

[143] In my humble view, however, an exception has to be made with regard to the first category of disputes which are founded on the constitutional qualification or eligibility criteria for several reasons...

[146] Any disputes that questions one's qualification or eligibility to vie in an election is invariably a challenge of the integrity or validity of that election. Needless to say that such dispute goes to the root of an election. As such, even though article 88(4)(e) vests IEBC with jurisdiction to handle this category of disputes, a purposive reading of other provisions of the [Constitution](#) would show that the election courts are also vested with jurisdiction to entertain them." (Emphasis mine)

18. Earlier, the Court of Appeal in [Kennedy Moki v Rachel Kaki Nyamai & 2 others](#) [2018] eKLR in observing that matters touching on the qualifications of a candidate go to the root of the elections had taken the position that the jurisdiction of IEBC is not exclusive and said;

" 57. Convinced that election is a process which includes nomination of candidates, we take the view that subject to finality and constitutional time lines of the jurisdiction of other competent organs, an election court has jurisdiction to hear and determine pre-election nomination disputes if such dispute goes to eligibility and qualification to vie and contest in an election. If a nomination certificate is issued to a person who is neither qualified nor eligible to vie in an election, the certificate is not conclusive proof of eligibility and qualification to vie. If a dispute arises as to the validity of such a certificate and eligibility to vie, an election court has jurisdiction to determine the validity of the nomination certificate and the eligibility to vie of the person bearing the certificate.

58. In our view, the provisions of article 88(4)(e) of the [Constitution](#) and section 74(1) of the [Constitution](#) are not clauses that oust the jurisdiction of an election court. Article 88(4)(e) confers jurisdiction of the Electoral Commission in settling of nomination disputes. The said article does not confer jurisdiction on the commission to hear election petitions. The article reserves the jurisdiction of an election court to determine election petitions. A nomination dispute that goes to the root of the electoral process, or one that determines qualification and eligibility of a candidate to vie, is an issue of substance that goes to the root of the election, and an election court has jurisdiction to hear and determine the dispute." (Emphasis added)

19. Just one week before the decision in [Mohamed Abdi's](#) case (*supra*) and in yet another dissent Maraga CJ, SCJ, (as he then was) in [Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others](#) [2019] eKLR, defined matters that go into the root of an election as: -

"(94) ... pre-requisites spelt out in the [Constitution](#) including a degree from a University recognized in Kenya as the minimum academic qualification for election as a County Governor as prescribed by articles 180(2) and 193(1)(b) read together with section 22(2) of the [Elections Act](#); and being a registered voter, nominated by a political party or as an independent candidate, is of



sound mind and is not an un-discharged bankrupt as required by article 99 of the Constitution.”

20. Even though dissents, I find it the two opinions logically and jurisprudentially compelling as espousing the constitutional ethos that the rule of law must be obeyed as a pillar of values and principles of governance. The consequence of an election not conducted in accordance with the Constitution are dire such as the conduct of fresh elections at the very least but the ignominy is the overthrow of the rule of law as the ultimate price. I shudder to ask what would be the outcome of a clear case of an illegible candidate who get his way into victory and into the office of a governor then it merges that he had no qualifications at all! Would an election court turn its eyes and face the other way and acquiesce to the obvious violation of the law? Wouldn't the court ask itself whether it can acquiesce to an illegality or improper conduct?
21. I pose all the questions to underscore the court's finding that the law must be obeyed and that before it locks a party from being heard by resorting to the very draconian remedy of striking out a matter, it ought to conduct a full inquiry into the legitimacy of the academic certificates presented by the 1st respondent so as to ensure that elections are carried out in accordance with the Constitution. On that basis alone, I would dismiss the objection.
22. Additionally, while this matter was pending this determination, the forum the respondents are asking the court to direct the petitioners to, the IEBC Dispute Resolution Committee, in Complaint No 230 of 2022, *Denis Gakuo Wabome vs Sakaja Koskei Nelson and another*, (unreported) delivered on June 19, 2022, has delivered itself and determined that it lacks the mandate and thus jurisdiction to investigate or otherwise ascertain the authenticity of academic certificates presented to it by a political aspirant beyond the provisions of regulation 47, *Election (General) Regulations, 2012*. In coming to that conclusion, the committee reasoned and said: -
- “ 52. Regulations 30, 33, 46 and 47 *Elections (General) Regulations, 2012* provide a list of what is required for a successful nomination of county governor candidates sponsored by political parties. The requirements are as follows:-
- a) An application for nomination fees
 - b) Prescribed nomination fees
 - c) Self-declaration form as prescribed under the Leadership and Integrity Act, 2012
 - d) Certified copies of certificates of the educational qualification.
For foreign degrees, one has to seek authentication of that body with the commission for University Education.
53. The Returning Officer is restricted to this list and any other requirement that the law may demand. We agree with Mr Kipkoge's assertions that the Returning Officer is not obligated to conduct investigation to ascertain the authenticity of a degree. Indeed, the RO's main obligation, in ascertaining of educational qualifications is to ensure that the provisions of regulation 47 *Elections (General) Regulations, 2012* are met. The said regulation provides as follows:-
- (1) For purposes of ascertaining the educational qualification of persons for an elective post, a person seeking nomination shall



submit to the commission certified copies of certificates of the educational qualification.

- (2) Where the body that issued the certificate is not based in Kenya, a candidate shall be required to seek authentication of that body with the Kenya National Examinations Council, in the case of form four certificates, or the commission for University Education, in the case of university degrees.

54. We further agree with Mr Okatch’s submissions that the commission, and by extension, the committee lacks the necessary tools with which to verify the validity of degrees presented by political aspirants.” (Emphasis added)

23. With that development, and before it is challenged and reversed by the court, and noting that the complaint here is on the same allegations as in the matter before the committee, it would be an injustice by way of denial of a right to access justice to accede to the preliminary objection and render the petitioners without a forum. A court of law cannot deny a litigant audience and leave such litigant without a recourse. I see this as an apt case for application of the exceptions to the doctrine of exhaustion in that a value of the *Constitution* regarding the rule of law would not be served if the court declines jurisdiction. The court is guided by the binding decision in *Geoffrey Muthig Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal held: -

“... the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

24. Accordingly, for the reasons set out above, this court finds that the preliminary objection was improperly taken and that it lacks merit and the same is thus dismissed with costs being in the cause.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF JUNE 2022.

PATRICK J O OTIENO

JUDGE

In the presence of:

Ms. Olucheli for the Petitioners

Mr. Malalah for the 1st Respondent

Ms. Odek for the 3rd and 4th Respondents

No appearance for the other Respondents

Court Assistant: Kulubi

